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Supreme Court, U.S.
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No. 90-1408

IN THE

Supreme Court of the United States

October Term, 1990

FRED T. BROWN,
Petitioner,

vs.

THOMAS STEEL STRIP CORP., *et al.*,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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PARTIES AND 29.1 STATEMENT

The plaintiff before the courts below was Fred T. Brown.

The defendants before the courts below were Thomas Steel Strip Corporation, Sam DiCiccio, Bill Riddick and Joe Maslach. Thomas Steel Strip Corporation's parent companies are Hille and Mueller, AG and BV Handelmaatshatij Voor Betonstaalmatten.

TABLE OF CONTENTS

PARTIES AND 29.1 STATEMENT i

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iii

ARGUMENT 1

TABLE OF AUTHORITIES

Cases

Hicks v. Brown Group, Inc., 902 F.2d 630 (8th Cir. 1990), *vacated and remanded*, 59 U.S.L.W. 3635 (March 18, 1991) (No. 90-324) 2

Lytle v. Household Manufacturing, Inc., _____ U.S. _____, 110 S. Ct. 1331 (1990) 4

McKnight v. General Motors Corp., 908 F.2d 104 (7th Cir. 1990), *cert. denied*, 59 U.S.L.W. 3635 (March 18, 1991) (No. 90-756) 5

Patterson v. McLean Credit Union, 491 U.S. 164, 109 S. Ct. 2363 (1989) 2,3,4,5

Prather v. Dayton Power & Light Company, 918 F.2d 1255 (6th Cir. 1990) 2

Runyon v. McCrary, 427 U.S. 160 (1976) 3

Taggart v. Jefferson County Child Support Enforcement Unit, 915 F.2d 396 (8th Cir. 1990) (per curiam); *reh'g granted en banc*, December 11, 1990, *argued*, February 1, 1991 2

Statute

Civil Rights Act of 1866, 42 U.S.C. Section 1981 2,3,4

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ARGUMENT

Petitioner has presented this case to the Court based upon subsections 1(a) and 1(c) of Rule 10, Rules of the Supreme Court of the United States. Contrary to Petitioner's contentions, neither of these provisions provides a basis for acceptance of this case by this Court.

Petitioner initially maintains that certiorari review should be granted because a split in authority exists between decisions of the Sixth and Eighth Circuit Courts of Appeals. *Compare Prather v. Dayton Power & Light Company*, 918 F.2d 1255 (6th Cir. 1990) *with Hicks v. Brown Group, Inc.*, 902 F.2d 630 (8th Cir. 1990). The split in authority that Petitioner describes no longer exists. Subsequent to the filing of Petitioner's Petition for Writ of Certiorari, this Court has vacated and remanded the decision of the Eighth Circuit in *Hicks. Brown Group, Inc. v. Hicks*, 59 U.S.L.W. 3635 (March 18, 1991). The other decision of the Eighth Circuit concerning discharge cases under Section 1981, *Taggart v. Jefferson County Child Support Enforcement Unit*, 915 F.2d 396 (8th Cir. 1990), *reh'g granted en banc*, December 11, 1990, is currently awaiting decision following oral argument conducted on February 1, 1991. As a result, no valid decision of any United States Court of Appeals holds contrary to the decision by the Sixth Circuit in *Prather* concerning the exclusion of termination cases from Section 1981. Consequently, the cases no longer reflect any split of authority on this issue and Petitioner's argument concerning such a split provides no valid justification for this Court's grant of review of the decision below.

Petitioner's second argument to justify review in this Court is equally erroneous. Petitioner claims that the Sixth Circuit's decision in this case does not conform with the prior views of this Court regarding the applicability of Section 1981 to discharge cases. In making such an assertion, Petitioner misconstrues the impact of *Patterson v. McLean Credit Union*, 491 U.S. 164, 109 S. Ct. 2363 (1989).

The decision in *Patterson* reaffirmed the general rule of *Runyon v. McCrary*, 427 U.S. 160 (1976), that §1981 prohibits racial discrimination in the "making" and "enforcing" of private contracts. *Patterson*, however, also clarified which aspects of the employment relationship are encompassed within the right granted by §1981 to "make" and "enforce" contracts. This Court concluded that the right to "make" contracts concerned itself only with the formation of the contract, not with problems that later arise:

> The first of these protections [to make contracts] extends only to the formation of a contract, but not to problems that may arise later from the conditions of continuing employment. The statute prohibits, when based on race, the refusal to enter into a contract with someone, as well as the offer to make a contract only on discriminatory terms. But the right to make contracts *does not extend, as a matter of either logic or semantics, to conduct by the employer after the contract relation has been established, including breach of the terms of the contract* or imposition of discriminatory working conditions.

Patterson, 109 S. Ct. at 2373 (citation omitted).

Similarly, this Court views the right to "enforce" contracts as relating only to the ability to enforce the contract through legal process:

> The right to enforce contracts does not, however, extend beyond conduct by an employer which impairs an employee's ability to enforce through legal process his or her established contract rights. As Justice White put it with much force in *Runyon*, one cannot seriously "contend that the grant of the other rights enumerated in §1981 [that is, other than the right to "make" contracts,] *i.e.*, the rights 'to sue, be parties, give evidence,' and '*enforce*

> contracts' accomplishes anything other than the removal of *legal* disabilities to sue, be a party, testify or enforce a contract. Indeed, it is impossible to give such language any other meaning."

Patterson, 109 S. Ct. at 2373 (citation omitted).

Applying these principles to the action that was brought by Petitioner, it is manifest that none of his allegations relate to the making and enforcing of contracts as defined by this Court. Contrary to Petitioner's assertions, the continued use of Section 1981 in cases involving terminations has been foreclosed by this Court in *Patterson*.[1]

Petitioner argues that the facts of the *Patterson* case did not include an allegation of wrongful termination and the case did not, therefore, upset prior case authority in that regard. Petitioner is, of course, correct in the technical sense that the facts of the *Patterson* case did not present the issue of racially-motivated termination. There is no doubt, however, that the majority opinion of this Court spoke expressly to the issue:

> . . . [T]he right to make contracts does not extend, as a matter of either logic or semantics, to conduct by the employer after the contract relation has been established, including breach of the terms of the contract . . .

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[1] *Lytle v. Household Manufacturing, Inc.*, _____ U.S. _____, 110 S. Ct. 1331, 1336 n.3 (1990), cited by Petitioner does not support the contrary proposition. The footnote in *Lytle* addresses the ability of the parties to argue the proper interpretation of *Patterson* when that issue was not properly presented to the Court. The Court concluded that the application of *Patterson* to the facts of that case should not be made without a full development of the record and a lower court determination.

Patterson, 109 S. Ct. at 2373. Further, at footnote 6 of the *Patterson* decision, this Court was careful to explain that it did not expect lower courts to expand the usual meanings of "make" and "enforce" to cover wrongs alleged by plaintiffs:

> In his separate opinion, Justice Stevens construes the phrases "the same right ... to make ... contracts" with ingenuity to cover various postformation conduct by the employer. But our task here is not to construe §1981 to punish all acts of discrimination in contracting in a like fashion, but rather merely to give a fair reading to [the] scope of the statutory terms used by Congress. We adhere today to our decision in *Runyon* that §1981 reaches private conduct, but do not believe that holding compels us to read the statutory terms "make" and "enforce" beyond their plain and common sense meaning. We believe that the lower courts will have little difficulty applying the straight-forward principles that we announce today.

Patterson, 109 S. Ct. at 2377 n.6. These plain statements of the Court demonstrate that no important issue remains to be resolved. *Cf. McKnight v. General Motors Corp.*, 908 F.2d 104 (7th Cir. 1990), *cert. denied*, 59 U.S.L.W. 3635 (March 18, 1991). For this reason and because no split in authority remains between the Circuit Courts of Appeal, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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